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REPORT
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TO ESTABLISH FEDERAL STANDARDS AND REGULATIONS FOR THE CONDUCT OF GAMING ACTIVITIES ON INDIAN RESERVATIONS AND LANDS, AND FOR OTHER PURPOSES

SEPTEMBER 26 (legislative day, SEPTEMBER 24), 1986.—Ordered to be printed

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Mr. ANDREWS, from the Select Committee on Indian Affairs, submitted the following

REPORT

[To accompany H.R. 1920]

[Including cost estimate of the Congressional Budget Office]

The Select Committee on Indian Affairs, to which was referred the bill (H.R. 1920) to establish Federal standards and regulations for the conduct of gaming activities on Indian reservations and lands, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

The amendment is an amendment in the nature of a substitute.

PURPOSE

The purpose of H.R. 1920 is to provide a statutory basis for the operation of gaming by Indian tribes and to establish a Federal regulatory program to guard against the intrusion of crime into tribal gaming operations in Indian country, while at the same time protecting the rights of tribes to conduct and regulate gaming operations as a means of generating needed tribal revenues and employment. H.R. 1920 was introduced in the House of Representatives by Mr. Udall on April 2, 1985. Companion legislation (S. 902) was introduced in the Senate by Senator DeConcini on April 4, 1985. On June 16, 1986, Senator Laxalt introduced similar legislation (S. 2557) which was proposed by the Administration.

There are significant differences in the three bills. However, each would establish a national Indian gaming commission with strong regulatory authority over the conduct of games and entry into the gaming activity by outside contractors. The most important difference in the three bills is in the role of tribes in the regu-

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lation and management of games. H.R. 1920 as passed by the House and as amended and reported out by the Select Committee on Indian Affairs recognizes a far stronger role to be played by the governments of the Indian tribes than would the legislation proposed by the Administration.

The Administration proposal, by contrast, would pre-empt nearly every authority currently exercised by the tribes, including the establishment of days and hours of operation, setting of pot limits, awarding of cash or other prizes, employment of personnel, and requiring tribes seeking to operate an authorized game to obtain a Federal license renewable at three year intervals.

Given the very strong role of the gaming commission established under the bill reported by Committee, and the lack of evidence of any significant criminal involvement in the operation of these games to date, the Committee does not believe that such a heavy Federal hand is appropriate at this time and has opted for continued tribal control, but subject to a strong Federal presence to assure the integrity of the games, and assurance that the tribes themselves derive the benefits from the operation of the games.

H.R. 1920, as reported out by the Select Committee on Indian Affairs, does not rest on the criminal/prohibitory, civil/regulatory distinction in the law as developed in court decisions discussed in this report. The bill recognizes the need to provide a regulatory scheme for the conduct of games by Indian tribes and does this by stating that tribes may conduct certain defined games (bingo, lotto and cards) under the Federal regulatory frame-work, provided the laws of the state allow such games to be played at all. All other games are prohibited as a matter of Federal law unless a tribe agrees with a state for the application of the state regulatory and criminal laws respecting such gaming operation, including the licensing of such game.

BACKGROUND

Only in recent years has Indian gaming, become a significant economic activity. Indian gaming has for the most part been subject to the continuing jurisdiction of the Indian tribes.

The Bureau of Indian Affairs in 1924 adopted tribal gaming laws as Federal laws for purposes of its Code of Federal Regulation Courts. Generally, under current law, state laws are not applicable to Indian tribes without the consent of Congress and the Federal government, and the Indian tribes exercise jurisdiction over Indian matters to the exclusion of the states. States have not been provided with jurisdiction directly over Indian gaming by any specific Federal statute, and no Federal statute has comprehensively addressed gaming on Indian reservations.

Indian gaming, particularly bingo has very recently become a significant economic activity. In testimony before this Committee on June 17, 1986, the Department of the Interior reported that 108 tribes had gaming facilities, 104 of these were conducting bingo. Some tribes operate both bingo and card games, and a few tribes operate just card games. No tribes are known to currently operate pari-mutuel dog racing, horse racing, or Jai-Alai. Receipts of some

tribes exceed $1 million annually, and the Department estimates that the combined receipts exceed $100 million annually.

The growth and economic viability of tribal gaming is directly related to series of decisions by federal courts, beginning with *Seminole v. Butterworth*, 658 F.2d 310 (5th Cir. 1982), *cert. denied*, 455 U.S. 1020 (1982). *Seminole* held that the Seminole tribe of Florida could operate its bingo enterprise free from state licensing and regulations. The Court based its decision on an analysis on P.L. 83-280 which had transferred limited jurisdiction over Indian reservations to some states, including Florida. The key question was whether Florida's bingo law was civil/regulatory or criminal/prohibitory in nature.

Only if the bingo law was criminal/prohibitory could the state apply it to the reservation. In order for a gaming law to be classified as criminal/prohibitory, the state must absolutely prohibit the gaming activity for any purpose by any person, organization, or individual. Florida's statute was held to be regulatory because it did allow some groups to operate bingo games.

This same analysis has been utilized in non P.L. 83-280 states in determining whether a tribal gaming activity is legal under the Assimilated Crime Act, or the Organized Crime Control Act of 1970. Only criminal/prohibitory state laws are assimilated. The Organized Crime Control Act, which is silent on its face concerning Indian tribes, makes gambling activities that violate the laws of the State, in which they are located, federal crimes. These Acts were not intended to apply to tribal bingo games. See *U.S. v. Farris*, 624 F.2d 890 (9th Cir. 1980) *cert. denied*, 449 U.S. 1111 (1981).

Since forty-five states permit some form of bingo, and only five states prohibit the game completely, many tribes saw bingo as a means of generating revenues.

The *Seminole* decision has been followed in *Barona Group of the Capitan Grande Band v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983); *Langley v. Ryder*, 778 F.2d 1092 (5th Cir. 1985); *Oneida Tribe of Indians v. Wisconsin*, 518 F. Supp. 712 (W.D. Wisc., 1981); *State of Washington v. Hatch*, C-83-1518R (W.D. Wash., Aug. 14, 1984), *appeal dismissed* (9th Cir., Feb. 21, 1985); *Mashantucket Pequot Tribe v. McGuigan*, Civil No. H-85-210 (D. Conn. Jan. 9, 1986); *Indian Country U.S.A. v. State of Oklahoma*, No. 85-C643-E (N.D. Ok., April 24, 1986); and *Cabazon Band of Mission Indians and Morongo Band of Mission Indians v. Riverside*, 783 F.2d 900 (9th Cir. 1986) probable jurisdiction noted 54 U.S.L.W. 3809 (U.S. June 9, 1986).

Only one federal appeals court case, *U.S. v. Dakota*, No. 85-1568, — F.2.—, (6th Cir. July 18, 1986) has reached a result somewhat different from *Seminole* with respect to Indian gaming. Using a different analysis on a somewhat different fact pattern, *Dakota* held that the Organized Crime Act of 1970, was violated by the operation of an individually owned but tribally licensed commercial gambling casino. A critical difference between *Dakota* and the above cases was that the "business" involved was a gambling casino, owned by individuals and run for personal profit as opposed to a game owned by the tribe which raised revenues for public pur-

pose. H.R. 1920, as reported, does not permit the type of gaming involved in the *Dakota* case.

Besides the favorable court decisions, it is clear that in these times of Federal budget reductions, many tribes, which have traditionally relied on Federal funding to conduct their tribal government operations, have found the revenues generated from on-reservation tribal gaming operations, to be a welcome source of funds to replace dwindling Federal dollars. As the Department of the Interior stated during its testimony before this Committee:

> Indian reservation gambling provides economic benefit to many of the tribes involved, especially those with no valuable natural resources or other significant sources of income. Tribes have used their bingo income for a variety of purposes relating to the welfare of their members, including supplementing activities that are financed by the Federal Government. Examples include the Creek Nation's payment of contract medical expenses for tribal members; the Sycuan Band's use of the funds for emergency loans, home repairs, fuel for homes, fire department equipment and operation, road repairs, and flood control repairs; the San Juan Pueblo's funding of a senior citizens program; the Fond du Lac Band's use of the funds to supplement the Head Start and other programs and to aid the construction of a health facility, and maintain and improve school and other public facilities and roads; and the Shakopee or Prior Lake Sioux Community's use of the funds to build a community center, dental clinic and health facility, and purchase a fire truck.
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> President Reagan's Indian policy statement includes the following passages which should be kept in mind in developing the Federal policy on Indian gambling:
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> "It is important to the concept of self-government that tribes reduce their dependence on Federal funds by providing a greater percentage of the cost of their self-government. Some tribes are already moving in this direction. This administration pledges to assist tribes in strengthening their governments by removing the Federal impediments to tribal self-government and tribal resource development . . . This Administration affirms the right of tribes to determine the best way to meet the needs of their members and to establish and run programs which best meet those needs. . . .
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> "It is the policy of this Administration to encourage private involvement, both Indian and non-Indian, in tribal economic development. In some cases, tribes and the private sector have already taken innovative approaches which have overcome the legislative and regulatory impediments to economic progress.
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> "Since tribal governments have the primary responsibility for meeting the basic needs of Indian communities, they must be allowed the chance to succeed . . ."

The thrust of President Reagan's Indian Policy Statement, referred to above, has committed the Administration, under the lead-

ership of the Department of the Interior, and with the support of the Department of Justice, to support and further the development of Indian bingo, which is denoted as Class II gaming in H.R. 1920. As such, the Department of the Interior has approved tribal ordinances and resolutions establishing and regulating gaming activities; financed by grant or insured loans Indian bingo activities under the Indian Finance Act [a federal contribution of at least 11 million dollars]; and issued guidelines and revised guidelines, under the requirements of U.S.C. § 81, for management contracts. In addition, both the Department of Housing and Urban Development, and the Department of Health and Human Services [Administration for Native Americans] have provided financial assistance to developing tribal gaming enterprises.

There is substantial agreement, between the Executive Branch and the Legislative Branch, concerning the desirability of continuing tribal bingo as a viable economic tool of the tribes. Tribal governments, in effect, are doing what many state governments are doing, using gaming as a means of generating revenues to provide governmental services.

There are significant concerns, however, that Congress, in preempting the Indian gaming field with a comprehensive statutory scheme, must adequately address the potential law enforcement concerns relative to high stakes Indian Gaming. The potential for criminal infiltration from organized crime has been a frequently expressed concern. According to the Criminal Division of the Department of Justice, Indian gaming operations currently regulated by tribal governments, with limited federal supervision are not now infiltrated by Organized Crime.

The conclusion that organized crime has not infiltrated Indian gaming operations is also reflected in the findings of the 9th Circuit Court of Appeals decision in Cabazon Band of Mission Indians and Morongo Band v. Riverside (1986), which stated that, in spite of the State's concerns about intrusion by organized crime in California, "There is no evidence whatsoever that organized crime exists on these reservations." The concern, has, therefore, focused on assuring that such infiltration does not occur in the future.

Several proposals were considered by the Committee, including one creating a federal regulatory presence with unlimited discretionary power over Indian gaming. The Committee reviewed this proposal closely but chose instead to recommend a comprehensive regulatory system under which responsibilities are divided between tribal governments and a federal regulatory Commission.

Another far reaching concern has been whether to allow states any jurisdiction over Indian gaming. One recommendation was to unilaterally transfer jurisdiction to states over all "hard core" gaming. "Hard core" gaming is defined as those games in the Class III section of H.R. 1920. The rationale for this approach, was to avoid duplication and to subject these more serious forms of gambling to the pre-existing state regulatory systems. The Committee chose instead, to bar such gaming on Indian reservations, but to allow a tribe and a state to request, on a case-by-case basis, that a particular Class III tribal activity be allowed to operate under state law. This approach avoids impinging on the right of tribal self-gov-

ernment, by providing for tribal consent before any jurisdiction may be transferred.

SUMMARY OF MAJOR AMENDMENTS

Section 5 authorizes the establishment of an independent, five member, National Indian Gaming Commission within the Department of the Interior. The Chairman and members of the Commission are appointed by the President, subject to the consent of the Senate. Commissioners serve a term of three years and can only be removed for cause.

The Chairman, subject to appeal to the Commission, has the authority to impose fines for violations of the Act, approve or disapprove Indian tribal gaming ordinances, and approve or disapprove of management contracts, pursuant to specified standards established in Sections 11 and 12, which condition and regulate gaming operations, and restrict who may be involved in such operations.

Section 12 limits gaming management contracts, with Indian tribes, to a term of seven years and transfers the authority of the Secretary of the Interior, to approve of encumbrances of Indian lands (held in trust by the United States), to the Commission, when such encumbrances are the result of a gaming management contract with a tribe.

In addition to bingo, "Class II gaming" includes, what the Committee considers to be, low stakes card games. Four states, which do not criminally prohibit card games, currently have some tribally operated card games operating within those states. Such card games would continue to be legal if they continue to be operated by the tribes in those states and remain within the same nature and scope as those card games are currently operating in that state or if they operate at a level which may, in the future, be authorized by state law.

Section 11 conditions Commission approval of tribal gaming ordinances, upon the establishment of an adequate system for conducting background investigations on and oversight of primary gaming management officials.

Class III gaming; which includes dog tracks, horse tracks and casinos, is made unlawful, on any Indian lands, unless a tribe and the state negotiate an agreement calling for a specific transfer of jurisdiction, to the state, and the Secretary of the Interior approves a request to transfer such jurisdiction to the state. A tribe may file an action in U.S. District Court, if it feels that a state has arbitrarily refused to negotiate a jurisdictional transfer, or license or otherwise authorize a tribe to engage in Class III gaming operations. It is the intent of the Committee that a legitimate state interest in denying a license, such as overcrowding, would be sufficient to overcome an allegation of arbitrariness.

This provision does not confer jurisdiction to the states over Class III gaming activities on Indian lands. Rather, it bans Class III gaming on Indian lands, unless the respective tribes wish to voluntarily agree to state jurisdiction prior to engaging in such gaming operations.

Section 14 authorizes the Chairman of the Commission to impose civil fines of up to $25,000 per violation against the tribal operator

or management contractor of an Indian gaming operation; for violations of any provisions of the Act, its implementing regulations or the tribal gaming ordinance, or resolution under which such game is operated. In addition to civil fines, the Chairman is further authorized to order temporary closure of an Indian gaming operation for substantial violations. Such temporary closure, upon notice and hearing, may be made permanent upon the majority vote of the Commission.

Sections 15 and 16 give the Commission and other federal officials extensive subpoena authority and investigative powers to ascertain whether the provisions of the Act of other Federal, state or tribal statutes are being violated.

Section 22 adds three new criminal sections to Chapter 53 of title 18 of the United States Code, generally state, criminal and civil laws regulating gaming activities in the respective states, are made applicable to Indian lands, and assimilated as violations of federal law, unless such gaming is authorized under this Act.

Additionally, criminal fines and imprisonment ranging from up to $100,000 and/or imprisonment up to a year through fines of $1,000,000 and/or imprisonment up to twenty years; are provided for any person who embezzles, steals, etc., money or property from an Indian gaming establishment. The severity of the maximum fine and/or imprisonment is determined by the value of what is taken, and whether the offender is an employee, or officer of the gaming operation, or a person unconnected with the gaming operation altogether.

LEGISLATIVE HISTORY

H.R. 1920, introduced on April 2, 1985, by Representative Udall for himself and Representatives McCain, Richardson, Bates, Snowe, Seiberling, and McKernan, is similar to H.R. 4566 introduced by Mr. Udall in the 98th Congress. On June 19, 1984, the House Interior and Insular Affairs Committee held hearings in the 98th Congress on H.R. 4566.

In the 99th Congress, the House Committee held three days of hearings on H.R. 1920 and related bills, H.R. 2420, H.R. 3130, H.R. 3745, and H.R. 3752. Hearings were held in Washington, D.C., on June 25, 1985; in San Diego, California, on September 13, 1985; and in Washington, D.C., on November 14, 1985. During these hearings, the Committee took oral testimony from the Departments of the Interior and Justice, and from both Indian and non-Indian public witnesses. In addition, the House Committee received numerous statements, submitted for the record, and extensive correspondence on the subject of the legislation.

The House Committee marked up H.R. 1920 on December 4 and 11, 1985. After extensive debate and amendments, the Committee ordered the bill reported on December 11, 1985, with an amendment in the nature of a substitute.

With further amendments, H.R. 1920 was passed by the House of Representatives on April 21, 1986, it was received the same day in the Senate, and was referred to the Select Committee on Indian Affairs.

A companion bill to H.R. 1920, S. 902 was introduced by Senator DeConcini on April 4, 1985.

The Select Committee held one day of hearings on S. 902 on June 26, 1985 and received testimony from over 40 Indian and non-Indian public witnesses. S. 2557 was introduced by Senators Laxalt and Hecht on June 16, 1986. On June 17, 1986, the Committee held an additional hearing on H.R. 1920, S. 902, and S. 2557. Representatives of the Department of the Interior and the Department of Justice, provided testimony as did an additional 30 Indian and non-Indian witnesses. In addition, the Committee received numerous statements on the subject of the legislation.

The Committee marked up H.R. 1920 on September 15 and 17, 1986. After extensive debate, the Committee on September 17, 1986 adopted an amendment in nature of substitute and ordered the bill reported.

COMMITTEE RECOMMENDATIONS AND TABULATION OF VOTE

The Select Committee on Indian Affairs, in open business session on September 17, 1986, with a quorum present, by a vote of six in favor and three opposed, ordered H.R. 1920 reported with an amendment in the nature of a substitute, with a recommendation that the Senate pass the bill as amended. Senators voting in favor were Senators Andrews, Goldwater, Murkowski, Abdnor, DeConcini and Burdick. Those opposed were Senators Gorton, Melcher and Inouye.

COMMITTEE AMENDMENTS

The Committee recommends an amendment in the nature of a substitute. A summary of the major amendments appears elsewhere in this report.

Section 1

Section 1 cites the act as the "Indian Gaming Regulatory Act".

Section 2 contains various congressional findings relating to the conduct of gaming activities on Indian reservations. Subsection (a) notes that a number of tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating governmental revenue. The record, developed by the Committee shows that many tribes, faced with severe cuts in Federal program aid supporting tribal government and tribal programs, and lacking a tax base or other source of governmental revenue, have turned to gaming as a source of such revenue. In this respect, they are not unlike many State governments who have turned to State lotteries, or other forms of gaming to supplement their tax revenue.

Subsection (b) finds that under existing law, state criminal laws are applicable in Indian country only to the extent that the Congress has provided by legislation that the States, rather than the Federal Government, should exercise jurisdiction over a particular subject matter.

Subsection (c) finds that Federal and tribal governments exercise criminal jurisdiction over crimes committed in Indian country, except in certain situations not generally related to gambling.

Subsection (d) finds that Federal law sometimes assimilates the criminal laws of the States when there is no general Federal criminal statute on point.

Subsection (e) finds that several Federal courts have held that State criminal laws are assimilated by Section 13 of title 18 United States Code for enforcement by the Federal Government in Indian country; that State gambling enforcement statutes are regulatory laws which are not assimilated by Section 13 of title 18 United States Code, or made applicable to Indians or Indian tribes by Pub. L. 83-280, and, consequently, that the Indian tribes have the exclusive right to regulate gaming which is not prohibited by Federal law and which is conducted in a State which does not, as a matter of public policy, prohibit such gaming.

For criminal law jurisdiction there are two major types of reservations. The first are reservations where jurisdiction over Indian residents is shared between the Federal and tribal governments and state laws do not apply. The second are those where Congress by statutes, generally enacted in the 1940's and 1950's, has allowed the states to exercise some or all criminal jurisdiction over Indians. (See, e.g., 18 U.S.C. 1162.) Even on the first type of purely "federal" reservation, however, some types of state laws have been adapted as federal law and made applicable to conduct by Indians through the Assimilative Crimes Act (18 U.S.C. 13) and 18 U.S.C. 1152. See *United States* v. *Sosseur*, 181 F.2d 873 (7th Cir. 1950); *United States* v. *Marcyes*, 557 F.2d 1361 (9th Cir. 1977), but see *United States* v. *Pakootas*, No. 4777 (D. Idaho, N.D. 1963) and *United States* v. *Quiver*, 241 U.S. 602 (1916). Nevertheless, courts have held that only state *criminal* laws are assimilated and that state *regulatory* laws, even though enforceable by criminal penalties, do not qualify as criminal. Moreover, it has also been held that even on the second type of reservation, where the state criminal laws apply to Indians, state regulatory laws do not.

The distinction between criminal and regulatory laws, while ambiguous, has been applied in situations involving bingo where courts have held, that certain state laws involving such matters as hours of play and the type of organizations that may profit from bingo, do not apply in Indian country. See *Barona Group of Mission Indians* v. *Duffy*, 694 F.2d 1185 (9th Cir. 1982); *Seminole Tribe of Florida* v. *Butterworth*, 658 F. 2d 310 (5th Cir. 1981). Since there are no federal laws regulating these matters, the only regulation is that provided by the tribes themselves.

Paragraph (6) states that Federal courts have held that section 81 of title 25 United States Code requires the Secretary of the Interior to review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts. A number of these cases have held that without Secretarial approval under Section 81, bingo management contracts are void and unenforceable. See *Wisc. Winnebago Business Committee* v. *Koberstein*, 762 F.2d 613 (7th Cir. 1985); U.S. *ex rel. Shakopee Madewakanton Sioux Community* v. *Little Six Enterprises*, 616 F. Supp. 1200 (D. Minn. 1985), on appeal Nos. 85-5279, 85-5280 (8th Cir.) *Flandreau Indian Management Company* v. *Flandreau Santee Sioux Tribe*, Civ. No. 84-4055 (D.S. Dak. unreported opinion, April 11, 1984). Accordingly, the Department of the Interior has issued

section 81 guidelines and tribes are submitting bingo management contracts to the Secretary or his designee for review.

Subsection (f) finds that existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands.

Subsection (g) finds that a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency and strong tribal government.

Section 3

Declaration of Policy—Congress desires to provide a statutory basis for the operation of certain Indian gaming. It also desires to assure that such gaming is adequately regulated by an independent Federal regulatory authority. The Congress finds that such regulation is necessary to shield these gaming enterprises from organized crime and other corrupting influences and to assure both the players and the operators that the games are conducted fairly and honestly. Congress believes these concerns are well addressed by the establishment of a National Indian Gaming Commission with the power to license and oversee the daily operations of such gaming enterprises.

Section 4

Subsection (a) makes Indian gaming unlawful on any lands taken into trust by the Secretary of the Interior after the date of enactment of this Act, if such lands are located outside the boundaries of such tribe's reservation. It also provides, however, that for purposes of Oklahoma, where many Indian tribes occupy and hold title to trust lands which are not technically defined as reservations, such tribes may not establish gaming enterprises on lands which are outside the boundaries of such tribes former reservation in Oklahoma, as defined by the Secretary of the Interior, unless such lands are contiguous to lands currently held in trust for such tribes. Functionally, this section treats these Oklahoma tribes the same as all other Indian tribes. This section is necessary, however, because of the unique historical and legal differences between Oklahoma and tribes in other areas. Subsection (a) also applies the same test to the non-Oklahoma tribes whose reservation boundaries have been removed or rendered unclear as a result of federal court decisions, but where such tribe continues to occupy trust land within the boundaries of its last recognized reservation. This section is designed to treat these tribes in the same way they would be treated if they occupied trust land within a recognized reservation. It is not intended to allow a tribe to take land into trust, for the purposes of gaming, on lands which are located outside the state or states in which the tribe has a current and historical presence. These limitations were drafted to clarify that Indian tribes should be prohibited from acquiring land outside their traditional areas for the expressed purpose of establishing gaming enterprises. Congress may, in the future, determine in specific situations that equity requires that a specific exemption to this rule be granted. The Committee feels, however, that such exemptions should be carefully considered on a case by case basis.

Subsection (a) is also not intended to affect or diminish Secretarial authority to take land into trust for non-gaming related purposes. Finally, this section does not apply to lands taken into trust as part of a settlement of a land claim or as part of the federal acknowledgement process. It is the intention of the Committee that nothing in the provisions of this section, or in this Act, will supersede any specific restrictions on gaming on Indian lands or any specific grant of Federal authority or jurisdiction to a state, which may be encompassed in another Federal statute. Examples of such statutes are the Rhode Island Claims Settlement Act (Act of September 30, 1978; 92 Stat. 813; P.L. 95–395) and the Maine Indian Claims Settlement Act (Act of October 10, 1980; 94 Stat. 1785; P.L. 96–420) in which a specific provision was made for jurisdiction to be established by the states, the tribes and the United States.

Subsection (b)(1) states that the prohibition against off reservation gaming described above, shall not apply if the tribe requesting the acquisition of such land in trust obtains the concurrence of the Governor of the state, the State legislature and the governing bodies of the county and municipality in which such lands are located.

Subsection (b)(2) grants a specific exemption to section 3(a) for certain designated lands outside the boundaries of the Miccosukee Indian Reservation in Florida. The Miccosukee Tribe is unique in that its current trust lands are located within the Everglades National Wildlife Refuge and thus the possibility for economic development within the boundaries of the Reservation are extremely limited. The lands addressed here are in close proximity to the Miccosukee Reservation and would be contiguous to the reservation but for the fact that the Reservation is surrounded by a National Wildlife Refuge. The land taken into trust by the subsection shall be subject to all licensing regulatory provisions of this Act.

Subsection (c) provides that relevant provisions of the Internal Revenue Code, such as section 3402(q) and chapter 35, title 26 United States Code, concerning taxation and the reporting and withholding of taxes relating to the operation of gaming activities shall apply to tribal gaming activities as they apply to state operated gaming activities.

Section 5

Subsection (a) provides for the establishment of a National Indian Gaming Commission as an independent entity within the Department of the Interior.

Subsection (b) paragraph (1) provides that the Commission shall be composed of five members. These members shall serve full-time and are subject to Presidential appointment with the advice and consent of the Senate. These members are composed of the following: a Chairman who may be recommended by the Secretary of the Interior and the Attorney General; one member, who may be recommended by the appropriate organizations or entities representing the interest of the States; and three members, all of whom shall be enrolled members of federally recognized tribes.

Paragraph (2) states that no more than three members of the Commission shall be of the same political party.

Paragraph (3) states that the one member representing the interest of the states and one of the three Indian members will each serve two year terms. All other Commission members will serve three year terms. Thereafter, all succeeding appointments will be for a term of three years.

Paragraph (4) prohibits any person who has been convicted of a felony or gaming offense, has any management responsibility for a gaming activity regulated under the Act, or has a financial or other interest in a management contract from being appointed to, or, continuing to serve on the Commission.

Paragraph (5) states that during a Commissioner's term of office, he or she may be removed only for cause. It also provides that vacancies occurring on the Commission shall be filled in the same manner as the original appointment and that a member of the Commission may continue to serve after the expiration of his or her term until his successor has been appointed unless he or she has been removed for cause.

Subsection (d) states that 3 members of the Commission shall constitute a quorum.

Subsection (e) states that the Commission shall select, by majority vote, one member who shall serve as Vice-Chairman and who shall preside over the Commission meetings in the Chairman's absence.

Subsection (f) states that the Commission shall meet at the call of the Chairman or a majority of its members.

Subsection (g) states that Chairman of the Commission shall be paid at a rate equal to that of level IV of the Executive Schedule (5 U.S.C. 5316). It further states that all other Commission members shall be paid at a rate equal to that of level 5 of the Executive Schedule (5 U.S.C. 5316) and all members shall be reimbursed for reasonable travel, subsistence and other expenses incurred by them in the performance of their duties.

Section 6

Subsection (a) specifies the powers of the Chairman subject to the approval of the Commission. These include the power to appoint a General Counsel, to select, appoint and supervise Commission staff, and order a temporary closure of an Indian game for a substantial violation of the provisions of the Act or the regulations of the Commission. While permanent closure of a tribal game requires a vote of not less than three of the Commission members, the temporary closure authority to the Chairman allows for a quick and uncomplicated shutdown of any establishment found to be operating illegally.

Subsection (b) details the powers of the Chairman which are subject to an appeal to the Commission. These include the power to levy and collect fines, the power to approve tribal gaming ordinances and resolutions and the power to approve management contracts. These specific powers are discussed in more detail in later sections of the Act.

Subsection (c) states that the Chairman shall have such other powers as may be delegated by the Commission.

Subsection (d) states that the decisions of the Chairman and the Commission under subsections (a) and (b) above shall be considered

final agency decisions for purposes of appeal to the appropriate Federal district courts pursuant to the Administrative Procedures Act, title 5, United States Code.

Section 7

Subsection (a) states that the Commission shall have the following powers which are not subject to delegation: the power to approve its annual budget, the power to adopt regulations for the assessment and collection of civil fines not to exceed $25,000 per violation against the tribal operator or management contractor of an Indian game for violation of this Act or the Commission's regulations; by a vote of not less than three Commission members, adopt annual assessment fees against tribal games to pay for the operating expenses of the Commission (such fees are discussed in more detail in section 17); and by a vote of not less than three Commission members authorize the Chairman to issue subpoenas for witnesses and physical evidence relative to the operation of an Indian game. The subpoena power is discussed in more detail in Section 15.

Finally, by a vote of not less than three Commissioners, after a full hearing, the Commission may make permanent a temporary order of the Chairman closing a gaming operation.

Subsection (b) details the other powers of the Commission. These include: the power to monitor Indian gaming activities on a continuing basis; to inspect and examine all premises where Indian gaming is conducted; to conduct or cause to be conducted such background investigations as may be necessary on persons affiliated with tribal games; to demand access to and inspect, examine, photocopy and audit all papers, books and records respecting the gross income of gaming activity; and all other matters necessary to the enforcement of the Act; the power to use the U.S. mail in the same manner as other departments and agencies of the U.S.; to procure supplies and services by contract; to enter into contracts with Federal, state and tribal and private entities for activities necessary to the discharge of the duties of the Commission; and, to the extent feasible, to contract with Indian tribes for the enforcement of the Commission's regulations, the power to hold hearings; to administer oaths and affirmations to Commission witnesses; and to promulgate such regulations as it deems appropriate to implement the provisions of this Act.

Section 8

Subsection (a) authorizes the Chairman, with the approval of the Commission to appoint a General Counsel with a background in Indian Affairs and establishes a maximum rate of pay for such position.

Subsection (b) provides that the Chairman may appoint other authorized staff of the Commission without regard to laws governing appointments in the competitive service and with regard to the pay provisions of title 5 U.S.C., except that no one so appointed can be paid in excess of the rate of pay established for a GS–17.

Subsection (c) authorizes the Commission to procure temporary and intermittent services as provided in Section 31009(b) of title 5, United States Code.

Subsection (d) authorizes, at the request of the Chairman, other Federal agencies to detail personnel to the Commission, unless otherwise prohibited by law.

Subsection (e) provides that the Secretary or the Administrator of GSA, shall provide administrative support services to the Commission on a reimbursable basis.

Section 9

Section 9 authorizes the Commission to request, and heads of Federal agencies or departments to provide information necessary to enable it to carry out this Act if not otherwise prohibited by Federal law.

Section 10

Section 10 directs the Secretary to promptly provide staff and support assistance, to provide interim regulations, and to provide an orderly transition to the Commission until such time as the Commission is formally appointed and can become organized.

Section 11

Subsection (a), paragraph (1) provides that Class I gaming, defined in Section 19 as social and traditional Indian gaming, shall remain in the exclusive jurisdiction of Indian tribes and shall not be subject to this Act. As with most cultures, most Indian tribes engage in traditional gambling activities. The "stick" or "bone" game, with variations, was and is played among many Indian tribes, usually in conjuction with tribal ceremonies or feasts. It is these kinds of activities which would not be covered under this legislation.

Paragraph (2) provides that Class II gaming shall remain within the jurisdiction of Indian tribes, subject to the provisions of this Act, when two conditions are met: the state within which the tribe is located permits such gaming; and such gaming is not otherwise prohibited by Federal law.

This paragraph recognizes that the jurisdiction of Indian tribes over Class II gaming has not been previously addressed by federal statute and, as such, tribal inherent governmental power or jurisdiction over such gaming has not been divested or transferred by any prior Acts of Congress.

The first condition, "where such Indian gaming is located within a state that permits such gaming for any purpose by any person organization or entity," is premised on the *Seminole Tribe* line of cases. There are five states (Arkansas, Hawaii, Indiana, Mississippi, and Utah) that completely bar the playing of bingo, and as such the statutory scheme of the Act bars any Indian tribe within those states from operating such gaming. In the other forty-five states, some form of bingo is permitted and where Indian tribes and Indian lands exist in those states, such tribes would be permitted to operate bingos as otherwise regulated by this Act. (Card games, the other form of Class II gaming are permitted by far fewer states and are subject to additional requirements, see 11(b)(2)(G) below). The language "for any purpose by any person, organization or entity," makes no distinction between charitable, commercial or

governmental gaming, or the nature of the entity conducting such gaming.

The second condition "not otherwise prohibited by federal law" refers to any federal statute that would specifically prohibit a defined gaming activity on Indian lands. Except for section 1175, title 15, United States Code which prohibits mechanical gambling devices on Indian lands, there currently are no such statutes. It is not the Committee's intent that general Federal laws, such as the Organized Crime Control Act, section 1155, title 18, United States Code, or the Assimilated Crimes Act, section 13, title 18, United States Code be construed to bar Class II gaming on Indian lands. It is the intention of the Committee that nothing in the provisions of this Section, or in this Act, will supersede any specific restrictions on gaming on Indian lands or any specific grants of Federal authority or jurisidiction to a State, which may be encompassed in another Federal statute. Examples of such statutes are the Rhode Island Claims Settlement Act (Act of September 30, 1978; 92 Stat. 813; P.L. 95–395) and the Maine Indian Claims Settlement Act (Act of October 10, 1980; 94 Stat. 1785; P.L. 96–420) in which specific provision was made for jurisdiction to be exercised by the States, the Tribe, and the United States.

Subsection (b) provides that net tribal revenues from the gaming activity may only be used to fund tribal government operations or programs; provide for the general welfare of its members; promote tribal economic development; donate to charitable organizations or to help fund local government agencies. It further states that, if the funds are used to make per capita payments to tribal members, such payments will be subject to Federal taxation. It is not intended that this be the case if any of such revenue is taken in trust by the United States, in which case the provisions of the Act of August 2, 1983 (97 Stat. 365) would be applicable.

Subparagraph (c) requires that outside, independent audits be conducted annually on the gaming activity and be made available to the Commission.

Subparagraph (d) provides that all contracts for supplies, services, or concessions in excess of $25,000, except for legal or accounting services, be subject to such audits if related to the gaming activity. This language is to insure that ancillary services related to a gaming activity are subject to open audits as the Committee is advised that criminal elements often target such activities for infiltration.

Subparagraph (e) provides that the tribal ordinance shall provide that the gaming activity will be conducted in a way which would protect the environment and public health and safety. It is not intended by this provision that the tribal gaming activity be subject to general Federal laws relating to the environment unless it would be so subject under existing law.

Subparagraph (f) provide that background checks be conducted on key officials of the tribally operated gaming enterprise to protect the integrity of such game. The responsibility for the system resides with the tribe. It is the Committee's intent that the Commission should disapprove of a tribe's gaming ordinance if its system is inadequate.

Subparagraph (g). Card games as permitted in Class II, may not exceed the same nature and scope of existing Indian games operated as of September 1, 1986, or the nature and scope which may in the future be authorized by state law. It is the Committee's intent to allow those currently operating Indian card games to continue to operate, and any new tribal card game within those states could not go beyond the nature and scope of the existing games. Only those types of card games permitted by state law can i.e. blackjack, draw poker, etc. can be operated. Nature and scope specifically refers to pot sizes and bet limits of the existing games. It is the understanding of the Committee that tribally operated card games currently exist in only the states of North Dakota, Michigan, Montana and California.

Paragraph (3). It is the intention of the Committee that Class II games be operated by the Tribes for the benefit of the Indian Community and not for individuals. Two exceptions are provided: An individual may be licensed to operate a game if such individual or entity could be state licensed and operates in conformity to state law; including days of operation, pot limits and use of funds. (2) A few individually owned Indian games that are tribally licensed in Oklahoma and Washington are allowed to continue to operate.

Subsection (c), Paragraph (1) provides that Class III games are prohibited by law unless the tribe and the state consent to a transfer of jurisdiction to the states for a particular Class III enterprise.

Paragraph (2) provides the mechanisms for the exemption from the Class III prohibition. When two conditions are fulfilled, the Secretary of the Interior shall transfer jurisdiction to the State. The first condition involves the trust obligation of the United States to the Tribe. This is fulfilled by review and approval of the tribal ordinance or resolution pursuant to Section 11 and review and approval of any management contract pursuant to Section 12. The Commission is delegated the responsibility to certify this trust function to the Secretary of the Interior. The second condition is the consent of both the tribe and the state to the jurisdiction transfer. The Secretary effects the transfer by a notice in the federal register. It is the intent of the Committee that state criminal and civil laws governing the regulations of gambling within the state, specifically including the issuance of licenses, shall then apply to the Class III Indian gaming activity.

Subsection (b) provides that the prohibition against mechanical games devices in Indian country would be lifted for such Class III gaming. If state law permitted such gaming, and the Indian Class III were operated pursuant to this subsection.

Subsection (c) provides that a Federal Court is authorized to order the issuance of a license if it finds that a state has withheld such a license arbitrarily. It is the intent of the Committee that a legitimate state interest in denying a license, such as overcrowding would be sufficient to overcome an allegation of arbitrariness. It is not the Committee's intention to require a state to license an Indian tribe to operate a Class III gaming enterprise if the state has a legitimate public purpose for refusing the license and the state would in fact not license the same operation if the application was from a non-tribal entity. Tribes are to be held to the same standards as other applicants.

Subsection (d) provides that the Chairman shall within 90 days approve ordinances where they meet the statutory standards.

Section 12

Section 12 requires approval of management contracts. The Commission must obtain the name of anyone having a financial interest or management responsibility in such a contract, and for any such person complete backgrounds, descriptions of previous tribal gaming, or other gaming involvement, and complete financial statements. Management contracts are required to provide that: adequate accounting procedures are required and that verifiable financial reports are available to the tribal council on a monthly basis; there is daily access and daily verification of income by appropriate tribal officials; there is a minimum guaranteed payment to the tribe that has preference over retirement of development or construction costs; there is an agreed to ceiling for repayment of development costs; there is a 7 year limit on the contract; and that the grounds and mechanisms for terminating such contract are specified. Contracts may not be approved where any management party: is an elected member of the tribal council on the other side of the contract; is convicted of a felony or gaming offense; has knowingly and willfully provided materially false information to the Commission or the tribe; or has been determined to be a person whose activities, criminal record, etc. pose a threat to the public interest or the effective regulation or control of gaming or enhance the dangers of unsuitable, unfair or illegal practices. Contracts shall also not be approved where: the contractor has or attempted to unduly interfere or influence for its gain, any decision of the tribal council relating to the gaming activity; the management contractor has deliberately or substantially failed to comply with the contract or gaming ordinance or resolution; a trustee utilizing the skill and diligence that a trustee is commonly held to would not approve the contract. Management contracts may be modified or voided for violations; and no management contract may by inference transfer any real property interest. Percentage fees may be approved if they are reasonable, but may not exceed forty percent of net revenues.

These standards were derived from the actual experiences of tribes in their dealings with management contractors. Many of the provisions come from actual contracts. The Committee feels that implementation of these provisions would cure most, if not all, of the problems that have surfaced with Indian gaming.

Section 13

Subsection (a) provides that as soon as possible after organization of the Commission, the Chairman shall notify any tribe or management contractor who, prior to enactment of this legislation adopted a tribal ordinance or entered into a contract on Class II or III gaming that such ordinance or contract must be submitted for his review within 60 days.

Subsection (b) provides that the Chairman, within 90 days after submission of a Class II ordinance under subsection (a) shall approve it if it conforms to section 11(b). If he determined that it does not, he shall advise the tribe of necessary modification and the

tribe will have 120 days to come into compliance by making the necessary modifications.

Subsection (c) provides that the Chairman, within 180 days after submission of a management contract pursuant to subsection (a), shall subject such contract to the requirements and process of section 12. If he determines that the contract and the management contractor meet the requirements of section 12, he shall approve the contract. If he determines that they do not, he shall provide notice to the tribe and to the contractor of necessary modifications and they shall have 180 days to come into compliance. The subsection also provides that, where the Secretary of the Interior or his representative has previously approved a contract submitted pursuant to subsection (a), such contract shall be deemed in compliance with the provisions of the Act and no further action shall be required. While the Committee intends that contracts previously approved by the Secretary shall be deemed in compliance with this Act, it is not intended that this would work to cure any legal insufficiency in such contract or approval under any other applicable tribal or Federal law.

Section 13 is a recognition by the Committee that there are numerous legal Indian gaming operations now being conducted on Indian lands and that those operations should be brought into compliance with the provisions of this law in a deliberate manner. It is not intended that those operations be affected by the provisions of this Act prior to the implementation of section 13.

Section 14

Subsection (a) provides that the Commission shall have authority to authorize the Chairman to levy and collect civil fines, not exceeding $25,000 per violation, against Indian gaming activities or management contractors for violations of the provisions of this Act or regulations adopted pursuant to the Act. It also provides that parties against whom the Chairman levies a fine shall have an opportunity for an appeal and hearing before the Commission.

Subsection (b) provides that the Chairman shall have power to temporarily close a gaming activity covered by this Act for substantial violation of the act or regulations adopted by the Commission. The Indian tribe or contractor involved shall have a right to a hearing, within 30 days after an order of temporary closure, before the Commission to determine if the order should be made permanent. The Commission may order permanent closure after such hearing only upon an affirmative vote of not less than three of its members.

Subsection (c) provides that final decisions of the Commission under subsection (a) and (b) shall be appealable to the appropriate Federal district court under the Administrative Procedures Act of title 5, United States Code.

Section 15

Subsection (a) provides the Commission with the power to issue subpoenas for the attendance and testimony of witnesses and the protection of documents.

Subsection (b) provides that the Attorney General may enforce the Commission's subpoenas.

Subsection (c) Courts of the United States shall have the authority to enforce Commission subpoenas through their contempt powers.

Subsections (d), (e) and (f)—The Commission is provided with the power to take depositions, under oath, and witnesses shall be entitled to the same fees as provided in the courts of the United States.

Section 16

Subsection (a). Information obtained by the Commission is confidential under the provisions of the Freedom of Information Act law enforcement and trade secrets exemptions.

Subsection (b). The Commission shall refer information indicating a statutory violation to appropriate law enforcement officials.

Subsection (c). The Attorney General is authorized to investigate activities associated with gaming which may violate federal law.

Section 17

Subsection (a), paragraph (1) provides that not less than three quarters of the Commission's annual budget shall be derived from assessments of Indian gaming activity of not to exceed two and one half percent of gross revenues.

Paragraph (2) provides that the Commission, by an affirmative vote of not less than three of its members, shall annually adopt the rate of assessment which shall be uniformly applied to all gaming activities and payable on a quarterly basis.

Paragraph (3) provides that failure to pay the assessment shall be grounds for revocation of any approval or license of the Commission required for the operation of a gaming activity.

Paragraph (4) provides that funds assessed in one year and not expended shall be carried over and credited on a pro rate basis against assessments for the succeeding year.

Paragraph (5) defines gross revenue, for purposes of this section, as total wagered monies less amounts paid out as prizes.

Subsection (b), paragraph (a) provides that the Commission, in coordination with the Secretary of the Interior and in conjunction with the Federal fiscal cycle, shall annually adopt the budget for the Commission.

Paragraph (2) provides that the Commission may request Federal appropriations, as provided in section 18, which not exceed more than one-third of the total assessment authorized and collected in the preceeding fiscal year.

Paragraph (3) provides that the Commission's appropriation request shall be subject to the Secretary's approval and included in the budget request of the Department of the Interior.

Section 18

Subsection (a) provides that, subject to section 17, there is authorized to be appropriated for the expenses of the Commission such sums as may be necessary.

Subsection (b) provides that, notwithstanding section 17, there is authorized to be appropriated not to exceed $2,000,000 to fund the Commission in the first fiscal year after enactment.

Paragraph (3) provides that failure to pay the assessment shall be grounds for revocation of any approval or license of the Commission required for the operation of a gaming activity.

Section 19

Section 19 contains definitions of various terms used in the Act.

Section 20

Section 20 provides that, consistent with the provisions of the Act, Section 1307 of title 18, United States Code, shall apply to tribal gaming activities. It is intended that gaming activities of an Indian tribe, whether operated directly by the tribe or under any management contract, would be treated the same as a State-owned gaming activity.

Section 21

Section 21 contains a severance clause providing that the invalidation of any provision of the Act shall not operate to invalidate the remaining provisions.

Section 22

Section 22 provides for the creation of two new federal crimes: 18 U.S.C. 1167. *Theft from Licensed Bingo Establishments* (for amounts $1,000 or under, penalties of fines up to $100,000 or imprisonment of up to one year, or both; for amounts in excess of $1,000, penalties of fines of not more than $250,000 or imprisonment of not more than 10 years, or both); and 18 U.S.C. 1168. *Theft by Officers or Employees of Licensed Bingo Establishments* (for amounts $1,000 or under, penalties of fines up to $250,000 or imprisonment of up to five years, or both; for amounts in excess of $1,000, penalties of fines of not more than $1,000,000, or imprisonment of not more than 20 years, or both); and 18 U.S.C 1168. Theft by officers or Employees of Licensed Bingo Establishments (for amounts $1,000 or under, penalties of fines up to $250,000 or imprisonment of up to five years, or both; for amounts in excess of $1,000, penalties of fines of not more than $1,000,000, or imprisonment of not more than 20 years, or both.

COST AND BUDGETARY CONSIDERATIONS

The cost estimate for H.R. 1920, as amended, as provided by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 22, 1986.

Hon. MARK ANDREWS,
Chairman, Select Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHARIMAN: The Congressional Budget Office has prepared the attached cost estimate for H.R. 1920, the Indian Gaming Regulatory Act.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

RUDOLPH G. PENNER, *Director.*

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: H.R. 1920.
2. Bill title: Indian Gaming Regulatory Act.
3. Bill status: As amended and ordered reported by the Senate Select Committee on Indian Affairs on September 17, 1986.
4. Bill purpose: This bill establishes the National Indian Gaming Commission and the criteria by which it is to regulate Indian gaming. It also delineates the composition, compensation, and duties of the commission.
5. Estimated cost to the Federal Government:

[By fiscal year, in millions of dollars]

	1986	1987	1988	1989	1990	1991
Estimated authorization level		0.8	0.8	0.8	0.8	0.8
Estimated outlays		.8	.8	.8	.8	.8

Note: The costs of this bill fall within budget function 450.

Basis of Estimate:

The bill specifies that the commission shall receive at least 75 percent of its funding through assessments on gross gaming revenues, with the remaining funding to be appropriated. Gross gaming revenues are defined as the difference between total revenues and payouts. The assessment is limited to no more than 2.5 percent of gross revenues. The Bureau of Indian Affairs currently estimates annual gross revenues to be about $100 million. This implies annual assessments of up to $2.5 million and a maximum annual commission budget of $3.3 million, up to about $0.8 million of which may be appropriated.

The estimate of the costs of H.R. 1920 is based upon these figures, which assume that gross revenues remain constant over time. Any change in gross revenues would be reflected in the annual funding of the commission, which would increase or decrease accordingly, with the limitation that, in the first fiscal year following the enactment of this bill, total appropriations shall not exceed $2 million. CBO estimates that gross revenues would have to increase tenfold in order for the commission to reach the $10 million to $15 million annual funding for gaming commissions in Nevada and New Jersey.

6. Estimated cost to State and local governments: None.
7. Estimate comparison: None.
8. Previous CBO estimate: CBO provided an estimate of H.R. 1920 as amended and ordered reported by the House Committee on Interior and Insular Affairs, December 11, 1985. CBO estimated annual appropriations and outlays of $0.5 million for the House-reported version, about $0.3 million less than those estimated for the Senate-reported version. The difference is the result of increased estimated gross gambling revenues.

9. Estimate prepared by: Paul M. DiNardo.
10. Estimate approved by: C.G. Nuckolz (for James L. Blum, Assistant Director for Budget Analysis).

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. Implementation of H.R. 1920, as amended, will require development of regulations to establish standards for review of adequacy of tribal ordinances; standards for review and approval of management contracts and contractors; information to be provided for background checks on management contractors and key operating personnel; and criteria or standards for audits. There should be little need for promulgation of regulations after the initial governing regulations are developed.

EXECUTIVE COMMUNICATIONS

The Committee received prepared statements and testimony from the Department of the Interior and the Department of Justice at its hearing on June 17, 1986. In addition, the Committee received the following communication from the Department of Justice.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS,
Washington, DC, August 12, 1986.

Hon. MARK ANDREWS,
Chairman, Select Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: It is my understanding that the Committee plans to convene on Wednesday, August 13, to mark-up Indian gambling legislation. Based upon a review of a staff draft bill that is expected to be the vehicle of the mark-up session, I must respectfully advise that the draft bill is, in our view, an anti-law enforcement measure which fails to accomplish the needed regulation of high-stakes gambling on Indian land. We must, therefore, vigorously oppose legislation based substantially upon the draft bill or H.R. 1920.

Representatives of the Department are available to meet with Senators or staff in an effort to develop a consensus bill that could be processed in the few remaining days of the 99th Congress. Such a compromise must, however, seek to balance law enforcement interests with the economic interests of tribes in gambling operations.

The staff draft falls far short of anything approaching a true compromise of these competing interests. Rather, it represents a rejection of the Administration bill in favor of virtually unrestrained gambling on Indian land. Enclosed is a statement which sets out our objections in more detail.

While we are prepared to work with you to develop consensus legislation in this area, we believe the scheduled mark-up of the staff draft would be a clear repudiation of the serious concerns

voiced by federal, state and local law enforcement officials. Should the Committee proceed to report out the staff draft, even with some amendments, the result will be a product which the Administration could not, in good conscience, accept.

Sincerely,

JOHN R. BOLTON,
Assistant Attorney General.

Enclosure:

This memorandum contrasts some of the major differences between S. 2557, a bill the Administration strongly supports, and H.R. 1920, a bill the Administration vigorously opposes. It will also mention some aspects of a draft bill given to the Department of Justice on August 11, 1986, which apparently will be used as the vehicle for the Committee mark-up on August 13th. While we have not had an opportunity to study this draft in detail, it appears to consist of the provisions in H.R. 1920 with at most some cosmetic changes. Since it apparently corrects few, if any, of the serious flaws we have noted in H.R. 1920, we find this draft equally unacceptable.

Initially, S. 2557 was drafted jointly by the Departments of Justice and Interior and strikes what we believe to be the proper balance between the interests of law enforcement in asserting some measure of control over a high stakes gambling operation and the equally legitimate interests of the tribes in preserving bingo as a revenue source. By contrast, neither H.R. 1920 nor the draft bill is adequate to ensure that tribally operated gaming remains free of criminal influences.

S. 2557 accommodates tribal interests and the interests of state and federal law enforcement. The bill preserves a valuable tribal asset by subjecting it to federal regulation reasonable and appropriate for the nature of the enterprise. Since the Administration submitted its bill, the Supreme Court noted probable jurisdiction in the case of *Cabazon Band of Mission Indians* et al. v. *County of Riverside and State of California* U.S. , 54 Law Week 3809 (June 9, 1986). The case will likely decide whether Indian gambling can be conducted free from state law requirements. While it is certainly within the power of the Congress to enact legislation in this area and thus allow Indian gambling to continue even if the Supreme Court rules against the tribes involved in the *Cabazon* case, you should be aware that H.R. 1920 essentially freezes the law concerning Indian gambling as it now is—with almost total control over gambling left to the many tribes—and would, in effect, overturn in advance a potential decision of the Supreme Court against the tribes. S. 2557 would also overturn a possible decision of the Court holding that tribes must abide by state bingo laws, but the key difference between it and either H.R. 1920 or the draft bill is that S. 2557 would impose the type of controls and safeguards necessary for high stakes gambling. The other bills simply do not do so.

S. 2557, drafted as a result of months of negotiations between Interior and Justice during which all points of view on this subject were fully heard, creates a three-member Commission with the authority to regulate bingo through the issuing of licenses to tribes

and individual employees of bingo establishments, the power to issue regulations, the right to conduct inspections, and the authority to impose sanctions on licensees who do not comply with Commission rules. By contrast, H.R. 1920 and the draft bill establish larger Commissions with a requirement that the majority of the Members be chosen from a list of names submitted by the very tribes operating gaming (in the case of H.R. 1920) or be enrolled tribal Indians (in the case of the draft bill). The Commission created by H.R. 1920 and the draft bill would have much more limited regulatory powers than would the Commission created by S. 2557, and would not have authority to license individual employees or to conduct the necessary background checks associated with such licensing. Moreover, it does not even require a tribe to obtain a license to run a bingo establishment. Rather, H.R. 1920 and the draft bill require only that a tribal ordinance authorizing gaming be submitted to the Chairman who must approve the ordinance if it meets the minimum standards set out in the bill. Thus, H.R. 1920 and the draft bill contain a very serious defect in not allowing the Commission to exercise real judgment and discretion over the factors that go into operating a high stakes gambling operation.

Nor is it realistic, as the proponents of H.R. 1920 apparently believe, to expect the tribes themselves to assert the type of control necessary to keep out undesirable elements. While some may possibly be able to do so, it is important to keep in mind that high stakes bingo is more closely akin to casino gambling than it is to the game played at churches and fire stations. The states of Nevada and New Jersey both have very active Gaming Commissions that try to keep their casinos free from criminal infiltration. Even so, they are not always successful. It is hardly reasonable, therefore, to expect that the tribes running bingo, some of which have fewer than 100 members and none of which remotely approach the two casino states in law enforcement expertise, can somehow successfully defend this revenue source against any number of criminals waiting in the wings to come after it. Thus, the concept of H.R. 1920 and of the draft bill that allows high stakes gambling to be conducted free of all state regulation and with, at best, very weak federal control and supervision is so seriously flawed that these bills are not acceptable to the Administration.

In our testimony before the Committee on H.R. 1920 and S. 2557, we pointed out a number of other aspects in which S. 2557 was clearly superior. Of these differences perhaps none is more striking than the way the Commissions established by the two bills would be funded. S. 2557 provides that the only costs to the taxpayer for its Commission will be small one-time start-up costs and the salaries of the three Commissioners. All other expenses would be defrayed by assessing the tribes operating bingo a percentage of their revenue. H.R. 1920, and the draft bill provide that up to one quarter of the Commission's budget be paid out of appropriated funds, thus imposing an additional burden on the taxpayers. It also unreasonably limits the ability of the Commission to levy assessments on the tribes so that it is by no means certain that even three quarters of its budget will be derived from the tribes. Thus, even more than one fourth of the budget may ultimately come from the

federal treasury. We believe it is highly irresponsible to create such an organization with no real idea of what it will cost year after year.

Finally, we cannot discern what the draft bill does with respect to tribally run gambling other than bingo, other than define it as "Class III gaming." [1] H.R. 1920 leaves up in the air the question of tribally run gambling—pari-mutuel wagering, for example—other than bingo. It would allow tribes operating such gambling on January 1, 1986, to continue to do so for four years during which a study of these operations will be undertaken.

During that period, the Commission would have to draft regulations for these other types of gaming—like horse and dog racing—substantially equivalent to those of the state wherein such gaming is conducted. This is a completely impractical, crazy-quilt, provision that will require the federal government to become deeply involved in areas like horse racing that have traditionally been areas of state control and in which the federal government has limited experience and expertise. It is the firmly held position of this Administration that the federal government should intrude less, not more, into the concerns of the states. Consequently, S. 2557 would allow state laws to control all forms of gambling other than bingo and purely social gambling. (Social gambling, of course, would be regulated by the tribes.) Thus, the Commission established by S. 2557 can concentrate on the difficult-enough task of regulating bingo without wasting its energies in attempting to regulate other forms of gambling which are producing little, if any, tribal revenue.

The Committee should carefully consider this information, the Administration's testimony on H.R. 1920 and S. 2557, and the other materials we have submitted comparing the two bills. As indicated, it appears that key provisions of the draft bill were either taken directly from H.R. 1920 or were inserted with only minor changes.

ADMINISTRATION INDIAN GAMBLING BILL

Treatment of Gambling on Reservations

Commercial bingo will be federally regulated where authorized by a tribe, except in five states which ban bingo.

Bingo will be authorized only on reservations, not on off-reservation trust lands taken by Interior specifically for bingo, except for five specifically "grandfathered" sites already in operation.

Ceremonial gambling will be tribally regulated.

All other forms of gambling will be subject to state regulation and licensing. State authority is made explicit to enforce in its own courts its laws concerning gambling other than ceremonial (which is to be regulated by the tribes)

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[1] It is worth noting that both the draft bill and H.R. 1920 define bingo so broadly as to include instant lotteries and numbers games. Thus, in the guise of allowing the tribes to run high stakes bingo, they also allow the tribes to run lotteries, even in states where lotteries (but not bingo) are made illegal as a matter of state law.

Federal Bingo Regulation

Bingo will be regulated by a full time Commission located in the Department of Interior.

Two of the Commissioners will be appointed by the Secretary of the Interior and be subject to removal by him. The third Commissioner will be appointed by the Attorney General and subject to removal by him. They can be "political" or career employees. The Secretary will select one of his appointees as Chairman.

The Commission will be directly responsible to the Secretary, will not be under the BIA, and will exercise rulemaking, licensing and investigative authority.

The Commission will have only a small staff. Most of its background investigation and inspection functions will be contracted.

The Commission will have its own General Counsel separate from the Interior Solicitor's Office.

Commission Powers

The Commission will have the power to—

issue rules subject to the approval of the Secretary and judicial review;

issue, deny, suspend, and revoke licenses to operate or work in bingo establishments, subject to Secretarial approval and to judicial review;

issue judicially enforceable mandatory and injunctive orders, and subpoenas for testimony and documents;

inspect premises, and have access to examine equipment and records, and to require independent audits;

contract with federal, tribal, state and private agencies, on a reimbursable or non-reimbursable basis, for services, such as audits of ongoing operations and background investigations for licensing.

Rulemaking Power

The Commission will have the power to make rules, consistent with the Act, on—

the need for licenses;
criteria for licensing;
fees and assessments;
hours and conditions of play;
prizes and operating cost limits;
admission and exclusion criteria;
credit policy;
alcohol (subject to tribal and State ordinance);
management contracts.

Tribal authority

Tribal authority to adopt and enforce regulations not inconsistent with the Act or Commission regulations is recognized.

Management Contracts

Contracts will be permitted, subject however to—

Commission approval;
intense background investigation;

limitation of profits to a reasonable amount;
a guaranteed fair return to the tribe;
strict accounting and auditing requirements.

Funding of the Commission

The gaming operations will fund the Commission's activities—

Start-up costs and Commissioners' salaries will, however, be funded by appropriations;

Applicants, including tribes already operating bingo, will be assessed the costs of processing their licensing applications, including background checks;

Operations of the Commission will be otherwise funded by assessments upon the licensed operators' revenues.

Miscellaneous

Criminal justice—

New offenses for depredations against licensed operations are added to the criminal code;

Violations of state gambling laws will generally be prosecuted by the state.

Civil aspects—

The Department of Justice will represent the Commission in court upon request of the Secretary.

MINORITY VIEWS TO ACCOMPANY H.R. 1920

We oppose H.R. 1920 as reported. The bill allows Indian tribes to engage in, or to allow other persons to engage in, high stakes commercial gaming free from any meaningful control by the states or the federal government. H.R. 1920 places great reliance on the Indian tribes' ability to supervise many types of gaming, principally bingo and card games such as poker and blackjack. In our view, few, if any, Indian tribes are capable of providing the in-depth supervision and control over these operations that are needed to keep them free of criminal infiltration and to ensure that the tribe reaps the benefits.

In opposing H.R. 1920, we do not deny that some tribes are profiting by their ability to run gambling operations free of state laws, particularly pot limits. This freedom from state regulation is a result of recent lower federal court decisions holding that state gambling regulations and licensing requirements, even if enforceable by criminal sanctions, do not apply in Indian country. One of these cases, *Cabazon Bank of Mission Indians v. County of Riverside et al.*, —— *U.S.* ——, 54 Law Week 3809, is now before the Supreme Court, but at the present time, in all states that allow a particular type of gambling subject to state controls and limitations, an Indian tribe is free to operate the same type of gambling free of those controls. For example, if a state allows bingo games to be run only by charitable orgnizations if played no more than once a week and for prizes no greater than $100, an Indian tribe can run bingo seven days a week with unlimited stakes. This results in the tribes' having a valuable asset enjoyed by no other entity or group of persons, namely the right to run unregulated commercial gambling. The tribes have marketed this asset running various forms of gaming that are patronized almost entirely by persons who are not Indians.

High stakes gambling involving non members of the tribe has played no part in tribal history or culture. Moreover, the states have traditionally regulated gambling and the court decisions holding that the tribes enjoy an exemption from state laws date only from a 1981 decision of the Fifth Circuit. See *Seminole Tribe of Florida v. Butterworth*, 658 F. 2d 310 (5th Cir. 1981). However, this exemption may be lost if the Supreme Court rules against the tribes involved in the *Cabazon* case. Should that happen, the tribes' gambling operations would be back under state control and subject to state licensing requirements.

We would prefer to see all gaming on Indian reservations subject to these state requirements since, in our view, a state's gambling and related law enforcement policies are seriously disrupted if they are not applied uniformly in all areas, not just in all areas except Indian reservations. Nevertheless, the fact that some tribes are deriving revenue from their gaming operations, principally bingo,

caused us to support a compromise between returning to complete state control and the virtually complete tribal control that now exists and to a large extent that would be perpetuated by H.R. 1920. We would be willing to allow the Indian tribes to continue to enjoy their present exemption from state laws for bingo and for somewhat similar games such as punch boards, pull tabs, and tip jars, provided these games are subject to meaningful federal control and supervision. This would preserve these games as a source of tribal revenue regardless of what the Supreme Court does in the *Cabazon* case. This is also the position of the Administration. The Departments of Justice and Interior prepared legislation which would have established a three person Commission in the Department of the Interior. Two of the Members of the Commission, including the Chairman, would have been appointed by the Secretary of the Interior and one by the Attorney General. That Commission would have been given broad licensing, inspection, and disciplinary powers similar to those exercised by the bodies responsible for regulating casino gambling in Nevada and New Jersey. In our view the high stakes bingo being played on Indian reservations is more akin to casino gambling than it is to bingo as conducted by religious or fraternal organizations and, accordingly, it needs to be subject to the same type of regulation that the casino states have found to be necessary.

Unfortunately, H.R. 1920 in no way provides for these controls. It is a dangerously deceptive bill because, while it may appear to some to set out meaningful federal supervision over tribal gaming, it actually merely ratifies the status quo and leaves the tribes free to do about what they are already doing in this area.

H.R. 1920 establishes a five person commission with certain powers with respect to tribally operated or licensed "Class II gaming," a term which will be discussed subsequently. The Members of the Commission are to be appointed by the President, with the advice and consent of the Senate. The Chairman is to be recommended by the Secretary of the Interior and the Attorney General and one member is to be recommended "by the appropriate organizations or entities, representing the interest of the States." That is one of the many undefined, ambiguous terms that are peppered throughout H.R. 1920. In any event, the three remaining Commissioners have to be enrolled members of Indian tribes, thus ensuring a working majority will come from the very groups being regulated. Should these Commissioners be members of tribes engaged in gaming activities, which is likely, this would be equivalent to a requirement that a majority of the Nevada Gaming Commission be chosen from a list of names submitted by the casino operators' trade association.

For a Presidentially appointed body, the Commission is extremely weak and is actually subservient, in many respects, to the tribes which operate gambling. For example, the Commission has no power to issue licenses to tribes desiring to engage in gambling operations or to key employees of those operations, two critical control mechanisms in any effective gaming regulation scheme. Rather, section 11 provides that the tribes themselves may engage in or license Class II gaming provided the Chairman of the Commission approves a tribal ordinance or resolution concerning the

activity.[1] Approval of a tribal ordinance does not provide anywhere near the type of authority needed to prevent corruption of the operation by outside management personnel and it does nothing at all to prevent one or two corrupt tribal officials from altering the operation from a tribal business to one operated for their own personal profit. We do not claim that tribal officials are particularly likely to do so but it is important to keep in mind that high stakes bingo can involve huge amounts of cash and very valuable peripheral service contracts that present a perfect opportunity for corruption and dishonesty. The nature of gambling operations requires careful screening of persons or organizations about to engage in it and rigorous inspections and examinations after they have begun. Both the screening and inspection functions must be carried out by a neutral, outside body with the independence, expertise, and inclination to accomplish these tasks in a way that does more than "rubber-stamp" tribal decisions.

H.R. 1920's treatment of management contracts is also a cause for grave concern. Unlike when a tribe proposes to start a gaming operation without the use of a management contractor, H.R. 1920 at least purports to provide for some pre-screening of operations that will use a management contractor. It does this by requiring in section 12 that the Chairman approve a management contract. Actually, however, this section merely delegates to the entire Commission the power already possessed by the Secretary of the Interior under existing law (25 U.S.C. 81) to approve management contracts. Under section 6(b)(3) the Chairman's decision whether to approve a management contract is subject to an appeal to the Commission. Accordingly, H.R. 1920 effectively shifts control over management contracts from the Secretary to the Commission, a majority of whom are to be Indians. Even if the Commission disapproved a proposed management contract there is nothing in H.R. 1920 to prevent a tribe from beginning operations on its own, for example by hiring as its employees the very employees of the management contractor whose background caused the management contract to be disapproved.

While our most serious objections to H.R. 1920 relate to the above-described law enforcement problems that will probably result from the weak Commission it creates, we also oppose the bill's allowing forms of gambling like lotteries, card games and, possibly, parimutuel wagering in ways that run directly contrary to state laws and policies. Initially, the bill defines "Class II gaming" to include "card games" and "pull-tabs, punch boards, tip jars, and other similar games," as well as bingo. Pull tabs and punch boards are a form of lottery. H.R. 1920 would allow the tribes to run lotteries, even in states that outlawed them, provided the state allowed some form of bingo. Since lottery tickets are typically sold at numerous locations—gas stations and restaurants, for example—

[1] At first glance, it would appear the provision giving the Chairman alone the power to approve tribal ordinances might reduce the effect of the guaranteed majority of three Indians and allow for some measure of independent judgment over tribal gaming ordinances and regulations. However, this provision must be read in conjunction with section 6(b)(3) which provides that the Chairman's power to approve tribal gaming ordinances or resolutions is "subject to an appeal to the Commission." In our view, this is but one example of the type of confusing draftsmanship in H.R. 1920 designed to disguise the true measure of control left with the tribes.

lottery regulation presents an entirely different set of problems from those associated with controlling bingo. Because we are aware that some tribes are profiting by pull tabs and punch boards, we were willing to compromise and allow such games to be played in a bingo hall during bingo hours, as a sort of "instant bingo." However, H.R. 1920 as reported goes well beyond this and allows wide open lottery games with tickets sold anywhere in Indian country at all hours of the day or night.

With respect to card games, section 11(b)(1)(G) of H.R. 1920 as reported allows tribes to authorize these operations, provided only that "card games may not exceed the same nature and scope as any tribally operated or regulated card games which are operative within such tribe's state on September 1, 1986, or may in the future be authorized by state law." The "nature and scope" phrase is unclear. It may have been intended to mean that if, on September 1, 1986, a tribe is running blackjack games with a $2.00 limit, it can continue to run $2.00 limit games. Arguably, however, if the tribe wanted to increase the limit to $500 it could do so since the game would still be blackjack, played by the same rules, and hence of the same "nature and scope." The "nature and scope" phrase will almost certainly cause considerable litigation. Even more important, however, it should be carefully noted that section 11(b)(1)(G) does much more than "grandfather" in the few tribes that are now running card games. It would allow every other tribe in any state where even one tribe is operating a card game by September 1, 1986 to start up games of the same "nature and scope."

H.R. 1920 as reported also is very unclear as to what other forms of gaming the tribes could authorize free of state control. It clearly provides that "Class I gaming" is to be left to the discretion of the tribe. But it defines Class I gaming as including "social games solely for prizes of minimal value *or traditional forms of Indian gaming engaged in by individuals as a part of or in connection with tribal ceremonies or celebrations*" (emphasis added). There is no requirement that only tribal members participate in such games and the italicized phrase is particularly unclear. Arguably, if betting on horse races were a "traditional" form of gaming for a particular tribe, that tribe, at least, could authorize several days of pari-mutuel wagering on horse racing "in connection with" a tribal celebration.

H.R. 1920 defines "Class III gaming" as everything not included in Class I or II. It would clearly include such things as casino gambling and any pari-mutuel wagering not included in Class I gaming. The bill states that Class III gaming shall be illegal in Indian country unless, pursuant to a confusing provision in section 11(c), the Secretary of the Interior, acting in accordance with a tribal request, transfers jurisdiction over a Class III gaming enterprise to the state. Whether or not a tribe would have to obtain a state license for, say, dog racing is unclear.

The ambiguities and uncertainties surrounding tribal, as opposed to state, control over card games and all forms of pari-mutuel wagering in H.R. 1920 as reported should be contrasted with how the Administration's bill covered these subjects. That bill did not ban these types of gaming in Indian country, but it required the tribe or anyone else wishing to engage in such an activity to comply

with all state laws, including any state licensing requirements. This simple, straight-forward approach gave the tribes the same opportunity as any other group or association of persons to obtain a racing license and thus derive revenue, and at the same time would not have created potential gaps in the way the states regulate pari-mutuel racing, an area in which many states have developed great expertise.

There are several other areas in which H.R. 1920 is seriously defective. For example, section 17 provides that at least three quarters of the Commission's operating budget is to be derived from assessments on the tribes' gaming operations. However, it limits the assessments to two and one-half percent of a tribe's gross gaming revenues. It is not clear what would happen if this limitation prevented the Commission from raising three quartrers of its needed revenues, and, in any event, one quarter would apparently be paid out of general appropriations. In contrast, the Administration's bill would have required all expenses of the Commission except small, one time start-up costs and the Commissioners' salaries to be paid for by the tribes profiting by gaming. (The payment of the Commissioners salaries was to avoid the appearance of impropriety resulting from the regulators being paid by the entities they were regulating.)

Another fiscally irresponsible provision in H.R. 1920 is a provision in section 8(b) allowing the Chairman to appoint the staff of the Commission without regard to normal civil service rules and with no limitations on pay other than a provision limiting a staff member's pay to that of a GS–17. There is no reason why most Commission employees such as accountants and secretaries should not be hired in accordance with civil service provisions and paid under a pay schedule appropriate for their work. Section 8(b) is an unjustifiable provision that invites the appointment of unqualified persons at inflated salaries.

In sum, H.R. 1920 is bad legislation. It does not provide the type of control needed over tribal gaming. It in no way balances tribal interest against either serious law enforcement concerns or against state gaming policies. It is extremely poorly drafted, and the Commission it creates will be yet another drain on the federal treasury. We hope that when the full Senate begins debate on this bill, these problems can be considered in depth so that all Senators may consider its effect on their states and make an informed decision. In our view, if the Senate is determined to act on this issue in advance of the Supreme Court decision in the *Cabazon* case, the Administration's bill is greatly to be preferred to H.R. 1920.

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